BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MIGUEL VALLES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,175
PEPSI COLA CO.	)	
Respondent	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the April 10, 2014, Order for Medical Treatment by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing, dated March 10, 2010, with exhibits attached; transcript of Preliminary Hearing, dated September 15, 2010, with exhibits attached; transcript of the Preliminary Hearing, dated March 16, 2011, with exhibits attached; transcript of the Settlement Hearing, dated June 28, 2012, with exhibits attached; and transcript of Post-Award Medical Hearing, dated April 9, 2014, with exhibits attached and the documents of record filed with the Division. Even though this matter came before the ALJ after the filing of a Post-Award Medical Application, at the hearing, the parties agreed to proceed under the preliminary hearing statute.

ISSUES

The ALJ granted claimant's request for medical treatment to his right hand and right arm. Claimant's request for an MRI of the low back was denied, as he failed to prove he was in need of additional testing or treatment as it relates to the low back.

Respondent appeals, arguing the greater weight of the evidence indicates claimant did not sustain an injury to his right wrist or forearm arising out of and in the course of his employment. Respondent contends there is not a causal connection, apparent to the rational mind, between claimant's June 20, 2006, single, traumatic accident and his alleged right carpal tunnel complaints. Therefore, respondent argues the Order should be reversed.

Claimant argues the Order should be affirmed. Claimant also filed a Motion to Dismiss on April 22, 2014, alleging the Board has no jurisdiction over this dispute as the Order of the ALJ grants claimant's request for medical treatment only, a non-jurisdictional issue.

Issues on appeal:

1. Does the Board have jurisdiction over this matter on an appeal from a preliminary hearing order?;

2. If so, did claimant sustain any injury to his right wrist and or forearm on June 20, 2006, arising out of and in the course of his employment?;

3. Is claimant's need for medical treatment to his right wrist and/or forearm the result of an injury on June 20, 2006, that arose out of and in the course of his employment?

FINDINGS OF FACT

Claimant suffered an accidental injury on June 20, 2006, while in the course of his employment with respondent. The injury occurred as claimant was finishing loading his sixth truck of the night. He was attempting to pull the trailer door shut, but it got stuck and the cord broke. As claimant pulled, he felt pain in both shoulders, with his right shoulder being worse. Claimant was referred to Dr. Raymundo Villanueva on June 29, 2006.

Claimant testified he reported to Dr. Villanueva that he had pain in both shoulders, back, upper back and neck. Dr. Villanueva's June 29, 2006, report indicated claimant alleged pain in the right shoulder from a work accident that radiated into the right side of his neck and down into his mid to low back. Claimant also reported pain to palpation of the right shoulder girdle musculature and the mid and low back, along with pain to palpation of the left upper trapezius. There was no mention of right or left carpal tunnel syndrome.

Dr. Villanueva diagnosed right shoulder girdle pain with extension to the mid and low back. He felt claimant's problem was muscular only and ordered an x-ray of the right shoulder and prescribed medication.

Claimant was seen by Dr. Villanueva again on July 13, 2006, for followup of his right shoulder and back pain. Claimant reported more pain in the right shoulder and pain that went into the right side of his neck. He had noticeable pain at the interscapular area and pain proximal to the right upper extremity in the back. Dr. Villanueva noted claimant had continued to work and noticed pain in the left shoulder and stiffness in the right leg. Dr. Villanueva's examination revealed claimant had pain to palpation of the right side muscles of the shoulder girdle but only on the back; pain on the left side, but less; pain on the right triceps area; full active range of motion of the right and left shoulder; pain in area of the right latissimus dorsi at the end of the flex abduction; pain to palpation of the right ileolumbar area; full range of motion of the trunk; and full rotation of the head and flexion to the left causing some pain in the right side of the neck. Dr. Villanueva opined claimant showed no improvement and continued to have pain in the right shoulder girdle area. He increased claimant's medication and recommended physical therapy to the right shoulder area. Again, there was no mention of right or left carpal tunnel syndrome.

Claimant reported his left shoulder problems to Dr. Villanueva at the February 26, 2007, followup visit. However, treatment for the left shoulder was postponed, so that claimant could see William Reed, M.D., on May 21, 2007, for his back pain. Claimant met with Dr. Villanueva through February 2007 and also on April 3, 2007, when he again complained of pain in his left shoulder, right shoulder and low back. Again, there were no carpal tunnel syndrome complaints documented.

At some point, claimant gave a recorded statement indicating he hurt his right shoulder on the date of accident, but he denied hurting the left shoulder. Claimant does not recall saying this or providing a statement. The statement was supposedly made approximately one week after the accident (June 26, 2006). There are apparently some pages missing from this statement and there is no indication as to who conducted the interview or when it occurred.

When claimant met with Dr. Villanueva on April 3, 2007, for followup for his chronic low back pain and pain in the right shoulder, claimant reported that an MRI of the left shoulder had been ordered, but never authorized. He noted more pain in his left shoulder and increased pain in his low back that intermittently goes into his lower extremities to his feet. His walking was limited due to pain. Claimant complained of pain to palpation of the left shoulder including the lower portion of the rhomboids, and pain to palpation of the low back. However, Dr. Villanueva noted claimant was not in any distress. Dr. Villanueva found claimant to have an increase in pain to the low back and shoulder due to a decrease in his pain medication. Dr. Villanueva decided to wait to see if workers compensation would authorize investigation of claimant's left shoulder, including the requested MRI. There was no mention of bilateral wrist pain.

On July 9, 2007, Dr. Neel assessed claimant a 13 percent impairment to the right upper extremity at the shoulder and recommended restrictions of no lifting, pushing, pulling, carrying using the right upper extremity greater than 20, 12, and 8 pounds; and all work at or below chest height would be appropriate. Dr. Neel indicated in his office note that he informed claimant the impairment rating was for range of motion and not pain and therefore the pain claimant was having was non-compensable.

Claimant met with Paul Stein, M.D., for an IME, on January 16, 2008, with complaints of back and right shoulder pain. Dr. Stein recommended claimant undergo a psychological evaluation with Dr. Moeller. On March 18, 2008, Dr. Stein indicated he was unable to determine a psychological impact for claimant's pain, but that claimant was exaggerating his discomfort.

In his April 18, 2008, report Dr. Stein evaluated claimant's low back complaints, finding some symptom magnification. He did not have the opportunity to review claimant's 2007 MRI, but went on to find claimant was in DRE Lumbosacral Category II of the AMA *Guides* and assigned a 6 percent whole person impairment. He felt future medical treatment for the low back may be required if the degenerative process progresses, symptomatology increases and neurological deficit occurs. These would be the result of the natural process of the disease and not related specifically to the work injury. Dr. Stein determined claimant would require a physician to monitor and provide analgesic medication and to wean claimant from narcotic medication, if possible. He also assigned permanent restrictions of no lifting over 20 pounds with any single lift, up to twice per day, 10 pounds occasionally and no frequent lifting; avoid lifting from below knuckle height; no repetitive bending and twisting of the lower back; and alternate sitting, standing, and walking as needed. Claimant's bilateral hand complaints were not mentioned in the report.

Claimant first met with George Fluter, M.D., for an examination for his low back and right shoulder complaints on June 18, 2009. After a series of visits, Dr. Fluter felt claimant should have an MRI and other diagnostic testing for the left shoulder.

Claimant met with John Babb, M.D., for a court-ordered IME, on October 26, 2009. Claimant reported the June 2006 accident resulted in pain to both shoulders and low back. Dr. Babb was provided medical reports detailing claimant's long history of physical problems stemming from the June 20, 2006, accident. After reviewing the reports, Dr. Babb examined claimant and diagnosed left shoulder rotator cuff syndrome, myofascial pain and left carpal tunnel syndrome. Dr. Babb opined claimant's work injury when he was opening and closing the door is consistent with his chief complaints of left shoulder pain. Based upon claimant's description of early onset problems, Dr. Babb opined the left wrist pain may have been aggravated or worsened during the work injury with the door. He noted claimant reported his hand going numb when he did heavy lifting at work. Dr. Babb recommended claimant get an MRI of the left shoulder and an NCT and EMG of the left upper extremity. Dr. Babb also assigned temporary restrictions for the left upper extremity

of lifting no more than 10 pounds; occasional overhead work; and limit repetitive grasping, gripping, squeezing and pinching of the left upper extremity.

It was Dr. Babb's opinion that claimant's left carpal tunnel syndrome symptoms were not causally related to the work injury of June 20, 2006. The doctor indicated that, although claimant may have had a clinical presentation of left carpal tunnel syndrome, it was not related to the June 20, 2006, injury. Right wrist symptoms were not documented.

Claimant believed he had a mild tear and he was treated with anti-inflammatories and pain medication. Claimant was referred to Dr. Alex Neel for treatment of the right shoulder, but that was postponed so he could have triple bypass surgery. Claimant met with Dr. Neel in November and ultimately had surgery on the right shoulder on March 9, 2009.

Claimant met with Jeffrey McMillan, M.D., for an agreed upon IME, on November 19, 2009. Claimant reported injury to both shoulders and his low back. Claimant complained of aching, stabbing pain radiating down the back of his neck and across the tops of his shoulders, with some paresthesia medial to the left scapula with sharp stabbing pain in the midline of the back and in the ulnar aspect of both forearms and hands. Claimant indicated numbness and paresthesia in the hands awakens him from sleep. Claimant also reported that he spends the majority of his time confined to a sofa all day long. Dr. McMillan diagnosed right subacromial decompression with repair SLAP lesion; bilateral carpal tunnel syndrome; and low back pain. He assigned a 5 percent whole person impairment for the low back. He provided no impairment for the shoulder complaints and carpal tunnel syndrome. Dr. McMillan noted in his report that claimant's complaints of back pain and his symptoms are far out of proportion to objective findings. He did not feel claimant would benefit from surgery and was unable to determine any work restrictions.

Claimant met with Dr. Babb on July 28, 2010, for followup of left shoulder pain and continued numbness and tingling of the left hand. Dr. Babb noted claimant's April 13, 2010, MRI of the left shoulder showed moderate osteoarthritis of the AC joint and abnormal signal and thickening involving the supraspinatus tendon consistent with moderated interstital tear/tendinosis. He opined the findings suggest nondisplaced linear tear involving the base of the superior labrum. An NCT/EMG revealed claimant to have a normal left upper extremity with no clear evidence of focal neuropathy, plexopathy or radiculopathy.

Dr. Babb ultimately opined claimant had left shoulder rotator cuff syndrome; myofascial pain; left carpal tunnel syndrome; and left shoulder labral tear. He indicated in his progress report that claimant wanted to proceed with a left shoulder scope, possible debridement and left carpal tunnel injection. When he became aware of claimant's right carpal tunnel syndrome, he indicated this was not related to claimant's work accident.

A preliminary hearing was held on September 15, 2010, at which time claimant requested authorization for an MRI and other diagnostic testing recommended by Dr. Fluter. This request was denied.

Claimant met with Pedro Murati, M.D., for an examination on June 7, 2011. His chief complaints were pain in the left wrist and shoulder; pain, numbness and tingling in the right wrist; constant daily low back pain that radiated down the right leg with numbness and tingling; and constant grinding and pain in the right shoulder. Claimant reported his low back was very tight at the end of the day and he experienced constant burning and pain in his right shoulder and a feeling of "nerve pain" in the left shoulder.

Dr. Murati examined claimant and diagnosed the following: myofascial pain syndrome of the right shoulder girdle, extending into the cervical and thoracic paraspinals; status post, 1. diagnostic arthroscopy of the left shoulder with biceps tenotomy for type II flap tear repair of a greater than 50% rotator cuff tear with two BioSwivel lock suture anchors, 5.5 mm anchors, subacromial decompression and limited acromioclavicular with Mumford procedure; low back pain with signs and symptoms of radiculopathy; right sacroiliac dysfunction; right carpal tunnel syndrome; status post left carpal tunnel release; status post, 1. arthroscopy of glenohumeral joint with arthroscopically performed SLAP repair, followed by subacromial decompression and co-planing of the acromioclavicular joint; and status post CABG, not work-related.

Dr. Murati opined claimant's diagnoses were a direct result of the work-related injury sustained on June 20, 2006. He assigned a 37 percent whole person impairment and permanent restrictions of: no climbing ladders; no crawling; no heavy grasping (>40 Kg) with the right and left; no above shoulder work with the right and left; no lifting carrying, pushing or pulling more than 20 pounds, occasionally 20 pounds and frequently 10 pounds; rarely bend, crouch or stoop; occasionally sit, climb stairs, squat, or drive; occasional grasp or grab with the right and left; frequently stand and walk; frequently repetitive hand controls with the right and left; no work more than 24 inches from the body on the right and left; avoid awkward positions of the neck; use wrist splints while working and at home; alternate sitting, standing and walking; no use of hooks or knives with the right and left; no keyboarding; no use of vibratory tools with the right and left an avoid trunk twisting.

Claimant's claim was settled on June 28, 2012, for a 62 percent work disability with a full and final resolution of all claims arising out of claimant's June 20, 2006, accident. Future medical was left open with medical expenses only to be incurred with the express advanced authorization of respondent, or upon proper application and order of the Court.

A post-award hearing was held on April 9, 2014, and the matter was treated as a preliminary hearing matter. Claimant asked for post-award medical treatment in the form of an MRI of the low back and carpal tunnel surgery to the right hand. Claimant testified his low back pain was getting worse and is now a 7 out of 10 on the pain scale. He also

testified he loses control of his legs three to four times a week. He has no warning as to when his legs are going to give out. Claimant's legs would go numb from his waist all the way down. This numbness began a year and a half ago. Claimant testified he tried to get an MRI three years ago, but was denied.

Claimant also asked for carpal tunnel surgery on his right hand. Claimant testified he injured his hand while working on his last trailer. He testified the driver was supposed to let him know if something was wrong with the trailers, but didn't and claimant knew there was a broken bearing on the door bay of the truck. When he went to close the door his shoulder got caught. He was using his right hand to do this. Claimant first felt like he pulled something in his shoulder and two or three days later he had pain in his hand and back.

Claimant testified his right hand problems wake him up three to four times a night and he only has sensation at his elbow. He has numbness and tingling in his fingers and back of his elbow. He rated his problems at a 6 out of 10. He has difficulty gripping and holding with his right hand. Dr. McMillan and Dr. Murati diagnosed claimant with bilateral carpal tunnel syndrome.

The ALJ noted at the end of the March 10, 2010, preliminary hearing that there was no indication the carpal tunnel syndrome was related to claimant's accident or that claimant had even complained about the carpal tunnel in relation to the alleged accident in 2006.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534a Furse 2000 states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.

K.S.A. 2005 Supp. 44-510k(b) states:

> (b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following the filing of such application for post-award medical treatment. Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted.

This Board Member shall first determine whether the Board has jurisdiction over this matter. Claimant filed a request for post-award medical treatment on March 21, 2014. The matter proceeded to hearing on April 9, 2014, at which time the parties agreed to proceed as if this were a preliminary hearing. Claimant contends since the parties so agreed, the limitations of K.S.A. 44-534a should apply. It is not disputed the Board has jurisdiction to review a matter determined pursuant to K.S.A. 44-510k. However, an appeal taken pursuant to the preliminary hearing statute is limited.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[1]

The Board has jurisdiction to consider this matter because the dispute raised by respondent is whether claimant suffered an accidental injury on June 20, 2006, to his right hand, sufficient to cause carpal tunnel syndrome to develop.

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[1] K.S.A. 44-534a(a)(2) Furse 2000.

Interestingly, there are no noted hand complaints contemporaneous with the accident alleged herein. This record fails to document any right wrist complaints for over three years after the accident, even though claimant testified that he suffered right hand and wrist pain shortly after the accident occurred. The ALJ went so far as to deny any treatment for claimant's alleged bilateral carpal tunnel syndrome at the March 10, 2010, preliminary hearing, noting there was no indication the carpal tunnel syndrome was related to the accident.

It is difficult to understand how claimant developed carpal tunnel syndrome so long after the accident when, by his own testimony, he spends most of his time lying on a couch. Claimant suffered a single traumatic incident on June 20, 2006. This Board Member fails to find a medical connection between the accident on June 20, 2006, and claimant's current complaints to his right wrist and hand.

It is true Dr. McMillan diagnosed claimant with bilateral carpal tunnel syndrome in 2009, but he makes no connection between that diagnosis and claimant's 2006 accident. This Board Member finds the opinion of Dr. Babb to be the most persuasive in this instance. Claimant has failed to prove his right carpal tunnel syndrome stems from the accident on June 20, 2006. The award of benefits by the ALJ for claimant's right carpal tunnel syndrome is reversed. The remainder of the April 10, 2014, Order remains in full force and effect.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, this Board Member finds the Award of the ALJ should be modified to deny claimant medical treatment for his right carpal tunnel syndrome, but affirmed in all other regards, so long as the Order does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order for Medical Treatment of Administrative Law Judge Pamela J. Fuller dated April 10, 2014, is modified as above noted, but otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2014.

_____
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge